

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

W/ affidavit of mailing

74-1447

*To be argued by
LYDIA E. MORGAN*

**United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-1447**

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT and
YANICK PETIT, on Behalf of Themselves, and all Aliens
in the United States similarly situated,

Plaintiffs-Appellants,

—v.—

LEONARD H. CHAPMAN, as Commissioner of the Immigration
and Naturalization Service and SOL MARKS, as New
York District Director of the United States Immigration
and Naturalization Service,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees.*

LYDIA E. MORGAN,
MARY P. MAGUIRE,
*Special Assistant United States Attorney
Of Counsel.*



TABLE OF CONTENTS

	PAGE
Statement of the Issues	1
Statement of the Case	2
Statement of the Facts	3
Relevant Statutes	8
Relevant Regulations	9
ARGUMENT:	
POINT I—Appellants lack standing to challenge the Service policy	10
A. <i>Appellants Noel and Petit were neither injured nor adversely affected by the policy changes</i>	10
B. <i>The resident alien appellants are not real parties in interest</i>	12
POINT II—The Court below was correct in holding that the Service policy does not deny equal protection to appellants and is reasonable in view of the statutory scheme which places no numerical quota on alien spouses by citizens but places such a quota on alien spouses of resident aliens	15
a. <i>Congress has plenary authority to prescribe the terms of an alien's entry</i>	15
b. <i>The Statutory Scheme</i>	16
c. <i>The Grant of extended voluntary departure is discretionary with the Attorney General</i>	19
d. <i>The Court below was correct in holding that the Service policy is reasonable in view of the statutory distinction created between classes of aliens according to spouse classification</i>	22
e. <i>Equal protection bars only invidious classifications</i>	26
POINT III—The Court below was correct in holding that Service policy is not invalid for lack of publication	31
CONCLUSION	36



TABLE OF CONTENTS

	PAGE
Statement of the Issues	1
Statement of the Case	2
Statement of the Facts	3
Relevant Statutes	8
Relevant Regulations	9
ARGUMENT:	
POINT I—Appellants lack standing to challenge the Service policy	10
A. <i>Appellants Noel and Petit were neither injured nor adversely affected by the policy changes</i>	10
B. <i>The resident alien appellants are not real parties in interest</i>	12
POINT II—The Court below was correct in holding that the Service policy does not deny equal protection to appellants and is reasonable in view of the statutory scheme which places no numerical quota on alien spouses of resident aliens	15
a. <i>Congress has plenary authority to prescribe the terms for an alien's entry</i>	15
b. <i>The Statutory Scheme</i>	16
c. <i>The Grant of extended voluntary departure is discretionary with the Attorney General</i>	19
d. <i>The Court below was correct in holding that the Service policy is reasonable in view of the statutory distinction created between classes of aliens according to spouse classification</i>	22
e. <i>Equal Protection bars only invidious classifications</i>	26
POINT III—The Court below was correct in holding that Service Policy is not invalid for lack of publication	31
CONCLUSION	36



CASES CITED

	PAGE
<i>Aguayo v. Richardson</i> , 413 F.2d 1090 (2d Cir. 1973)	30
<i>Application of Amoury</i> , 307 F. Supp. 213 (S.D.N.Y. 1969)	27
<i>Barlow v. Collins</i> , 397 U.S. 1959 (1970)	11
<i>Bartsch v. Watkins</i> , 175 F.2d 245 (2d Cir. 1949)	20
<i>Boraas v. The Village of Belle Terre</i> , 476 F.2d 806 (2d Cir. 1973), rehearing en banc denied, rev'd — U.S. —, 39 L. Ed. 2d 797	29
<i>Brodie v. Immigration and Naturalization Service</i> , unreported (2d Cir. 1972) Docket No. 72-1429	27
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	30
<i>Data Processing Service v. Camp</i> , 397 U.S. 150 (1970)	11
<i>Diaz Vasquez v. Marks</i> , unreported 73 Civ. 920 (S.D. N.Y. April 6, 1973) (MacMahon, J.)	33
<i>Diric v. Immigration & Naturalization Service</i> , 400 F.2d 658 (9th Cir. 1968), cert. denied, 394 U.S. 1015	20
<i>Doebla Greeting Cards, Inc. v. Summerfield</i> , 116 F. Supp. 68 (D.C. D. Ct. 1953), aff'd 227 F.2d 44 (D.C. Cir. 1955)	11
<i>Du Roure v. Alvord</i> , 120 F. Supp. 166 (S.D.N.Y. 1954)	14
<i>Ekiu v. United States</i> , 141 U.S. 651 (1892)	15
<i>Faustino v. Immigration & Naturalization Service</i> , 432 F.2d 431 (2d Cir. 1970)	27
<i>Fleming v. Nestor</i> , 363 U.S. 603 (1960)	26
<i>Fook Hong Mak v. Immigration and Naturalization Service</i> , 485 F.2d 128 (2d Cir. 1971)	24
<i>Gagliano v. Bernsen</i> , 243 F.2d 880 (5th Cir. 1957)	14, 15
<i>Galvan v. Press</i> , 347 U.S. 522 (1954)	15

<i>Goldman v. Zurchler</i> , 394 U.S. 103, 109-110 (1969)	11
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971)	30
<i>In re Griffiths</i> , 413 U.S. 717 (1973)	30
<i>Gruenwald v. Gardener</i> , 390 F.2d 591 (2d Cir. 1968)	26
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580 (1952)	14, 15
<i>Hitai v. Immigration and Naturalization Service</i> , 393 F.2d 466 (2d Cir. 1965), cert. denied, 382 U.S. 816	16
<i>Hintopoulos v. Shaughnessy</i> , 233 F.2d 705 (2d Cir. 1956), aff'd 353 U.S. 72 (1957)	12, 20
<i>James v. Shaughnessy</i> , 202 F.2d 519 (2d Cir. 1953), cert. denied, 395 U.S. 969 (19)	25
<i>Lee Pao Fen v. Esperdy</i> , 423 F.2d 6 (2d Cir. 1970)....	19, 20
<i>Lewis-Mota v. Secretary of Labor</i> , 337 F. Supp. 1281 (S.D.N.Y. 1972), rev'd 469 F.2d 478 (2d Cir. 1972)	
	31, 33, 34
<i>Londono v. Immigration & Naturalization Service</i> , 433 F.2d 635 (2d Cir. 1970)	4
<i>Manatan v. Immigration & Naturalization Service</i> , 443 F.2d 30 (9th Cir. 1971)	20
<i>Maryland Casualty Co. v. Pacific Coal and Oil Com- pany</i> , 312 U.S. 270 (1941)	11
<i>Massachusetts v. Mellow</i> , 262 U.S. 447 (1923)	12
<i>Mendez v. Major</i> , 340 F.2d 128 (8th Cir. 1965)	12
<i>Oceanic Navigation Co. v. Stranahan</i> , 214 U.S. 320 (1910)	16
<i>Papageorgiou v. Esperdy</i> , 212 F. Supp. 874 (S.D.N.Y. 1963)	12
<i>Perdido v. Immigration & Naturalization Service</i> , 420 F.2d 1179 (5th Cir. 1964)	12, 14, 28
<i>Pharmaceutical Manufacturers Association v. Finch</i> , 307 F. Supp. 858 (D. Del. 1970)	32

<i>Polites v. Sahli</i> , 302 F.2d 449 (6th Cir. 1962)	20
<i>Railway Express Agency v. Kennedy</i> , 189 F.2d 801 (7th Cir. 1951), cert. denied, 342 U.S. 830 (1951)	10
<i>Roumeliotis v. Immigration & Naturalization Service</i> , 304 F.2d 453 (7th Cir. 1962), cert. denied, 371 U.S. 921	35
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	11
<i>Silverman v. Rogers</i> , 437 F.2d 102 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971)	12, 13
<i>Spata v. Immigration & Naturalization Service</i> , 422 F.2d 1013 (2d Cir. 1971), cert. denied, 404 U.S. 875	20
<i>Sugarman v. Dougall</i> , 413 U.S. 634 (1973)	30
<i>Swartz v. Rogers</i> , 254 F.2d 338 (D.C. Cir.), cert. denied, 357 U.S. 928 (1958)	12, 13
<i>Takahashi v. Fish and Game Commission</i> , 334 U.S. 410 (1948)	30
<i>Talanoa v. Immigration & Naturalization Service</i> , 397 F.2d 196 (9th Cir. 1968)	27
<i>Tan Wan Keung v. Immigration & Naturalization Service</i> , 434 F.2d 301 (2d Cir. 1971)	33
<i>Texaco, Inc. v. Federal Power Commission</i> , 412 F.2d 740 (3rd Cir. 1969)	31, 35
<i>United Public Workers v. Mitchell</i> , 300 U.S. 75 (1947)	11
<i>Wan Ching Shek v. Esperdy</i> , 304 F. Supp. 1086 (S.D. N.Y. 1969)	21
<i>White v. Kwock Sue Lum</i> , 291 F. 732, 734 (9th Cir. 1923), cert. denied sub nom. <i>Kwock Sue Lum v. White</i> , 263 U.S. 715 (1923)	12
<i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483 (1955)	26
<i>Yick Wo v. Hopkins</i> , 718 U.S. 356 (1886)	30
<i>Young v. Powell</i> , 179 F.2d 147 (5th Cir. 1950)	14

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1447

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT and
YANICK PETIT, on Behalf of Themselves, and all Aliens
in the United States similarly situated,

Plaintiffs-Appellants,

—v.—

LEONARD H. CHAPMAN, as Commissioner of the Immigration
and Naturalization Service and SOL MARKS, as New
York District Director of the United States Immigra-
tion and Naturalization Service,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

Statement of the Issues

1. Whether the appellants have standing to challenge the Immigration and Naturalization Service policy.
2. Whether the court below was correct in holding that the Immigration and Naturalization Service policy does not deny equal protection to appellants and is reasonable in view of the statutory scheme which places no numerical quota on alien spouses of citizens but places such a quota on alien spouses of resident aliens.
3. Whether the court below was correct in holding that the Immigration and Naturalization Service policy is not invalid for lack of publication.

Statement of the Case

This is an appeal from an order and judgment of the Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York. On February 8, 1974, Judge Gagliardi entered an order denying the appellants' motion for a preliminary injunction in accordance with his opinion dated February 6, 1974 (68a).¹

On August 24, 1973, the appellants instituted this action in which they sought a declaratory judgment declaring a discretionary policy of the Immigration and Naturalization Service (hereinafter the "Service") to be unlawful. Pursuant to that policy, the Service declined to grant discretionary relief from deportation to deportable aliens who are married to Western Hemisphere permanent resident aliens solely on the basis of their marital relationship. Appellants further sought to permanently enjoin the Service from carrying out this policy or, more specifically, from deporting appellants Noel and Petit while the policy is effective.

The Government consented to a temporary stay of deportation for the two deportable alien plaintiffs until their motion for the preliminary injunction could be heard, and this stay continues in effect. Thereafter, the Court below denied the appellants' motion on the ground that the policy was reasonable in view of the statutory scheme which imposes no numerical limitations on the entry of spouses of United States citizens, but imposes such numerical limitations on the entry of spouses of permanent resident aliens. This statutory distinction has a practical effect on the length of time which aliens must wait for permanent admission into the country. Western Hemisphere aliens who are married to permanent residents wait for a longer period in order to obtain an immigrant visa than aliens who are married to United States citizens. The definitive

¹ References followed by the letter "a" refer to pages in the Plaintiffs-Appellants' Appendix, attached to their brief.

issue raised is whether those aliens who are married to permanent residents have the right to discretionary relief which would permit them to await visas in this country as do those aliens who are married to United States citizens.

Statement of Facts

Noel

Rodolphe Noel ("Noel") is an alien, a native and citizen of Haiti. He was admitted to the United States on May 24, 1969 as a non-immigrant visitor for pleasure, authorized to remain in this country for two months. However, Noel failed to depart after two months and remained here illegally for nearly three years before he was apprehended by officers of the Service on June 15, 1972. On June 16, 1972 the Service commenced deportation proceedings against him by the issuance of an Order To Show Cause and Notice of Hearing.

At the hearing, held on June 27, 1972, Noel admitted that he was deportable as an overstay visitor and requested the discretionary privilege of voluntary departure in lieu of deportation.² To obtain this privilege he represented to the Immigration Judge that he was willing and able to leave the country at his own expense within whatever time the Government prescribed. Accordingly, he was granted until September 27, 1972 within which to effect his voluntary departure. It was alternatively provided that if he should fail to leave within this period, he would be deported to Haiti.

² Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. § 1254(e), provides that in the course of a deportation proceeding an alien may apply for the privilege of voluntary departure which may be granted by the immigration judge (formerly "Special Inquiry Officer") in his discretion. 8 C.F.R. § 244.1. However, extension of initial period of time for voluntary departure can be granted solely by the District Director. 8 C.F.R. § 244.2.

Instead of availing himself of the privilege of voluntary departure, the alien continued to remain in the country in his illegal status for over a year following the deportation hearing. Finally, on July 12, 1973, the Service issued a warrant of deportation against him, and by letter, ordered that he report to the Service's offices on August 21, 1973, for deportation to Haiti.

On August 20, 1973, Noel informally requested that the District Director restore and extend for an indefinite period his long-expired time for voluntary departure. The basis for his request was that, on April 19, 1973, he had married the appellant, Emiris Noel, a lawful permanent resident of the United States, and had thus become exempt from the requirement of obtaining labor certification prior to applying for an immigrant visa. In consequence thereof, Noel was requesting that the period for voluntary departure be indefinitely extended until a visa became available. Under the numerical quota applicable to Western Hemisphere aliens, there is a wait of approximately two years between first application and the issuance of an immigrant visa. The District Director declined to grant the relief requested but stayed Noel's deportation for seven days to allow his attorney to commence this court action.

Petit

Appellant Antoine Petit is also a native and citizen of Haiti who was admitted to the United States as a non-immigrant visitor for pleasure, authorized to remain for two months. Petit was admitted to the country on August 4, 1970. He, too, remained beyond his allotted time, obtained employment in violation of his non-immigrant status,³ and was apprehended by Service officers on June 7, 1973, while at the place of his illegal employment.

³ Non-immigrants admitted for pleasure are not permitted to accept employment in the United States. *Londono v. Immigration and Naturalization Service*, 433 F.2d 635 (2d Cir. 1970). 8 C.F.R. § 214.1(c).

The Service promptly commenced deportation proceedings against Petit by the issuance of an Order To Show Cause and Notice of Hearing. At the hearing, held on June 8, 1973, Petit conceded that he was deportable and requested the privilege of voluntary departure in lieu of deportation. The Immigration Judge granted voluntary departure until July 8, 1973, and ordered deportation in the alternative if the alien failed to depart.

Before the time for voluntary departure expired, Petit married the appellant, Yanich Petit, on June 26, 1973. Yanich Petit had entered the United States only seven days earlier as a permanent resident immigrant. Like Noel, Petit then applied for an immigrant visa. As the spouse of a permanent resident alien he, too, became exempt from the labor certification requirements of § 212 (a)(14) of the Act, but faced a wait of more than two years until a visa became available under the Western Hemisphere quota. Petit also applied to the District Director for an extension of the time for voluntary departure until the visa became available. By letter dated July 18, 1973, the District Director informed Petit that his request was denied and that he was required to leave by July 27, 1973 (52a). Petit did not leave and on August 6, 1973, the Service issued a warrant of deportation (48a). He was ordered by letter to report to the Service's offices on September 5, 1973 for deportation to Haiti. The Petits joined appellants Noel in bringing this action.

The Applicable Policy

The District Director's decision to deny relief to Noel and Petit was in accord with a Servicewide policy which contained guidelines within the framework of which the various District Directors were to exercise their discretion. Between 1968 and 1972 the usual nationwide policy of the Service had been *not* to permit Western Hemisphere aliens who were in this country and married to lawful per-

manent resident aliens to remain in this country until an immigrant visa became available unless unusual considerations were present (61a). However, the nationwide policy was apparently not followed in the New York District which, at least until June of 1972, had a more liberal policy than other Districts and routinely granted such aliens extended voluntary departure, as a matter of discretion, until an immigrant visa became available (63a).

In August, 1972, however, the policy to enforce departure became uniform throughout the Service. On June 27, 1972 Congressman Rodino, Chairman of the House Judiciary Committee, advised the Commissioner of the Service that hearings conducted by subcommittee No. 1 of the Judiciary Committee had indicated that employment of illegal aliens in this country was having an unfavorable influence on the domestic job market, and that routinely permitting aliens to await visa availability in the U.S. was no longer justifiable. The Service informed all its district directors that as of July 31, 1972, Western Hemisphere aliens should not routinely be granted extended voluntary departure time to await issuance of a visa solely on the basis of their relationship to a permanent resident alien although such aliens could be granted stays of departure, in individual cases, where compelling factors warranted such relief. However, aliens previously granted deferred departure would not be affected (65a).

In April of 1973 the policy was modified, effective April 10, 1973, so as to allow the earlier New York policy of leniency to be applied to those aliens who were present in this country on April 10, 1973, and who had the requisite family relationship on or before that date. Western Hemisphere aliens entering the country or obtaining the requisite family relationship after April 10, 1973, continued to fall within the general policy described above. The modified policy was intended to cover only cases then

in process (55a) and was not intended as an invitation to such aliens to thereafter enter this country, acquire the specified relationship, and remain unlawfully (56a).

Congressman Rodino had reversed his earlier position and suggested to the Service's Commissioner, in a letter dated March 28, 1973, that, in view of legislation pending in the House of Representatives, which would radically change the rules regarding immigration from the Western Hemisphere, perhaps the deportation of close relatives of permanent resident aliens should be delayed.⁴ The Commissioner, however, adopted only the modification specified above.

Noel and Petit are not covered by the modified policy since, although they were present in this country prior to April 10, 1973, they did not acquire the specified relationship until after that date. However, both could obtain such relief if they could establish to the satisfaction of the District Director that their individual cases contain compelling factors which warrant favorable consideration. They have, however, failed to allege such special circumstances and have alleged only the fact of their marriages. Accordingly, the District Director's denial of relief was a proper exercise of discretion in accord with the nationwide discretionary guidelines.

⁴ This legislation, H.R. 981, is still pending. Under proposed H.R. 981, the two separate overall quotas would be abolished in favor of one overall numerical ceiling for the entire world of 250,000 per year. The visa preference system, now applicable only to the worldwide quota would be revised so as to apply to all areas including the Western Hemisphere.

Relevant Statutes

Immigration and Nationality Act, 66 Stat. 163 (1952),
as amended:

Section 244, 8 U.S.C. § 1254—

* * * * *

(e) the Attorney General may, in his discretion, permit any alien under deportation proceedings, . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is and has been a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

Administrative Procedure Act, — Stat. — (19 .).

8 U.S.C. § 553(b)

* * * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.

* * * * *

8 U.S.C. § 553(b)(3)(A)

. . . this subsection does not apply—

(A) to interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice. . . .

Relevant Regulations

Title 8, Code of Federal Regulations [CFR]

§ 244.2 Extension of time to depart.

Authority to extend the time within which to depart voluntarily specified initially by a special inquiry officer or the Board is within the sole jurisdiction of the district director. A request by an alien for an extension of time within which to depart voluntarily shall be filed with the district director having jurisdiction over the alien's place of residence. Written notice of the district director's decision shall be served upon the alien, and no appeal may be taken therefrom.

The basis and purpose of the above-prescribed rules is to authorize a special inquiry officer to specify the time during which the respondent who has been granted voluntary departure may depart, fix the responsibility for extending initially authorized voluntary departure time with the district director, and permit the special inquiry officer to grant a stay of deportation in connection with a motion to reopen or reconsider filed in a deportation proceeding.

ARGUMENT

POINT I

Appellants lack standing to challenge the Service policy.

a. Appellants Noel and Petit were neither injured nor adversely affected by the policy changes

On August 1, 1972, when the New York policy with respect to the granting of extended voluntary departure was brought into strict conformity with the nationwide policy, and on April 10, 1973, when this policy was relaxed as to aliens present and married to permanent residents as of that date, Noel and Petit were unmarried and were illegally present in the country.⁵ Under such circumstances, it is difficult to perceive how either alien could have been adversely affected, on either date, by a policy intended to apply only to *married* aliens.

Uncontrovertibly, the still unmarried Noel and Petit would have lacked standing to come into Court as parties aggrieved by the challenged conduct on the day of the change in policy or the day of the subsequent modification of that policy. Thus, it is unclear exactly how their present claim of injury now derives. The standing requirement demands an injury to the existing rights or obligations of a party. What appellants must show is that the change in policy invaded some legally protected interest of theirs which is either recognized by common law or created by statute. *Railway Express Agency v. Kennedy*, 189 F.2d 801 (7th Cir. 1951), cert. denied, 342 U.S. 830 (1951);

⁵ Mrs. Petit was not present until June 19, 1973, 7 days before her marriage to Petit.

Dochla Greeting Cards, Inc. v. Summerfield, 116 F. Supp. 68 (D.C.D.Ct. 1953), *aff'd*, 227 F.2d 44 (D.C. Cir. 1955).

Prior to August 1, 1972, when the stricter Service policy became nationwide, all that either of the deportable alien appellants had was the hope that if they should marry lawful permanent resident while still illegally present in the United States, then they too would receive the same generous grant of discretionary relief from deportation which had been granted to others in the past by the New York District of the Service. Of course, if the appellants resided outside the New York District they did not have even that hope. Certainly this is not a legally protected interest which can convey standing to sue.

A party may be found to have standing where he has been caused an "injury in fact" and where his injury "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Service v. Camp*, 397 U.S. 150, 152-53 (1970); *Barlow v. Collins*, 397 U.S. 1959 (1970).

Contrary to the position apparently taken here by appellants, the standing requirement demands more than an injury to a cognizable interest. It requires that "the party seeking review must show that he be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). Clearly, Noel and Petit were not "among the injured" on either August 1, 1972 or April 10, 1973.

Moreover, the courts have held that the injury which plaintiffs seek to right must be real and immediate, not conjectural or hypothetical. *Goldman v. Zurchler*, 394 U.S. 103, 109-110 (1969); *United Public Workers v. Mitchell*, 300 U.S. 75 (1947); *Maryland Casualty Co. v. Pacific Coal and Oil Company*, 312 U.S. 270, 273 (1941). It must be alleged that the plaintiff has sustained or is in immediate danger of sustaining some direct injury as a

result of the challenged statute or official conduct. *Massachusetts v. Mellow*, 262 U.S. 447, 448 (1923). We submit that neither real nor immediate injury to either of the deportable appellants is present.

b. The resident alien appellants are not real parties in interest

The courts have long recognized that the power of Congress to exclude the alien relatives even of United States citizens is not open to doubt. *White v. Kwock Sue Lum*, 291 F. 732, 734 (9th Cir. 1923), cert. denied *sub nom*, *Kwock Sue Lum v. White*, 263 U.S. 715 (1923). This proposition has been carefully adhered to even though the conditions imposed by the legislature may cause a certain amount of hardship upon an alien's citizen spouse or other relatives. *Hintopoulos v. Shaughnessy*, 233 F.2d 705 (2d Cir. 1956), aff'd., 353 U.S. 72 (1957); *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971); *Perdido v. Immigration and Naturalization Service*, 420 F.2d 1179 (5th Cir. 1964); *Mendez v. Major*, 340 F.2d 128 (8th Cir. 1965); *Swartz v. Rogers*, 254 F.2d 38 (D.C. Cir.), cert. denied, 357 U.S. 928 (1958); *Papageorgiou v. Esperdy*, 212 F. Supp. 874 (S.D.N.Y. 1963).

The resident alien appellants appear to be arguing that some legally protected "right" of theirs would be violated by the enforcement of deportation orders against their alien spouses. In so doing they have misplaced their reliance on an erroneous assumption of law. It is well-settled that the marriage of a United States citizen to a deportable alien gives the citizen no rights which are violated by the deportation of the alien spouse. See *Swartz v. Rogers*, *supra*, and *Silverman v. Rogers*, *supra*. Certainly, appellants' rights, as resident aliens, cannot exceed those of United States citizens.

In *Swartz*, the Court held that the marriage of a citizen to a deportable alien did not give the citizen either a contract right or a marital status which was so protected by the due process clause that an alien spouse could not be deported. In a particularly careful analysis of this issue, the *Swartz* court reasoned that the essence of the citizen's claim is a right to live in this country, but the court stated:

"Certainly deportation would put burdens upon the marriage. It would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created. . . . Under these circumstances we think the wife had no constitutional right which is violated by the deportation of her husband." *Id.* at 339.

Similarly, in *Silverman v. Rogers, supra*, a United States citizen and his alien wife unsuccessfully sought to enjoin the commencement of deportation proceedings against the wife who, under the exchange visitor provisions of the Act, was subject to a requirement that she reside abroad for at least two years upon completion of training in the United States before she could become eligible for an immigrant visa or permanent residence. The couple challenged the refusal of the United States Government to waive a two-year foreign residence requirement as to the wife who had entered the United States for training for service in her country, and had married her husband, an American citizen, during her stay in the United States.

Plaintiffs argued that a refusal by the government to allow Mrs. Silverman the right to reside in the United States would deprive plaintiffs of their constitutional rights. In response the Court stated,

"Mrs. Silverman enjoys no special right to remain in this country, it being within congressional discretion to place conditions on her right to entry or continued residence. *Harisiades v. Shaughnessy*, 342 U.S. 580, 584-591 (1952); *Perdido v. I.N.S.* 420 F.2d 1179 (5th Cir. 1969)." *Id.* at 107.

The Court denied a judgment instructing officials to issue a waiver of the two-year foreign residence requirement as to Mrs. Silverman, and held that the government's refusal to issue a waiver would not deprive the alien and her United States citizen husband of any constitutional rights.

Plaintiffs also argued that the government's action was destroying their marriage, but the Court found that the government had done nothing more than so say that the residence of one of the parties may not be in the United States. It also found that the validity of the marriage had not been attacked. The government submits that neither appellants' right to marry nor the validity of their marriage has been challenged here. Furthermore, the Court noted that ". . . at least one and presumably both of the parties were well aware before their marriage that Mrs. Silverman had agreed to return to Turkey. Under these circumstances, we see nothing unfair in permitting the Government to carry out its policies." *Id.* at 107. Again, the same principle is applicable to the instant appellants.

It is a fundamental legal principle that every action shall be prosecuted in the name of the real party in interest. The real party in interest has been held to mean the party who by the substantive law has the right sought to be enforced. *Young v. Powell*, 179 F.2d 147 (5th Cir. 1950); *Gagliano v. Bernsen*, 243 F.2d 880 (5th Cir. 1957); *Du Roure v. Alvord*, 120 F. Supp. 166 (S.D.N.Y. 1954); 3 *Moore's Federal Practice* (2d ed. 1964), par. 17.02, page 1305.

In *Gagliano v. Bernsen, supra*, the Court of Appeals for the Fifth Circuit rejected the claim of the son of a deported alien that his father should be returned to the United States. The Court held that the son of a deported alien was not a person who possessed the right sought to be enforced and was therefore not a real party in interest within Federal Rule 17(b) which requires that all actions be brought in the name of the real party in interest.

In the instant case, the resident alien spouses of Noel and Petit lack the substantive right sought to be enforced and, for this reason, are not real parties in interest. Accordingly, we submit that absent a right of their own the permanent resident aliens lack standing to maintain this action.

POINT II

The Court below was correct in holding that the Service policy does not deny appellants' equal protection and is reasonable in view of the statutory scheme which places no numerical quota on spouses of citizens but places such quota on spouses of resident aliens.

a. Congress has plenary authority to prescribe the terms for an alien's entry

The Supreme Court long ago affirmed the ancient maxim of international law that the power to exclude or admit aliens is inherent in sovereignty. *Ekiu v. United States*, 141 U.S. 651, 659 (1892); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952). Furthermore, it found that "[P]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government" and are entrusted exclusively to Congress. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

It is well settled that Congress' power to prescribe conditions and terms upon which aliens may enter the United States is plenary and unfettered. *Hitai v. Immigration and Naturalization Service*, 393 F.2d 466 (2d Cir. 1965), cert. denied, 382 U.S. 816. Indeed, "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1910). The challenged Service policy is reasonably related to statute and only reflects statutory distinctions.

b. The statutory scheme

In drafting the sweeping 1965 amendments to the Immigration and Nationality Act, Congress was not classifying or discriminating against either citizen or alien residents of the United States but was prescribing the order of priority in which aliens can come into the United States. In so doing, the legislators recognized that far more potential immigrants wanted to enter the country than could be admitted and it was their objective to devise a system of immigrant selection which was designed to be "fair, rational, humane and in the national interest. . . ." ⁶

In amending the Act, Congress had as its main objective the abolition of the old national origins system of visa allocation. See Senate Report No. 748, 89th Cong. (1965) and Conference Report No. 1101 (to accompany H.R. 2580), 89th Cong., 1965, appearing in *United States Code Congressional and Administrative News*, 1965, Vol. 2, p. 3328.⁷ However, although the national origins system was abolished, it remained necessary to impose a numerical limitation on immigration.

⁶ 1965 U.S. Code Cong. and Administrative News, Vol. 2, p. 3332.

⁷ The 1965 legislation replaced the "National Origins" Quota system (Immigration Act of 1924, as amended, 39 Stat. 153) which allocated, pursuant to a formula based on the ethnic composition of the United States at the time of its enactment, a limited number of visas to foreign states.

Accordingly, an overall annual limit of 170,000 (the "worldwide quota") was imposed on immigration from all areas exclusive of the Western Hemisphere,⁸ and within this overall ceiling a limit of 20,000 per year was placed on each country.⁹

In sharp contrast to the worldwide quota, the flow of immigration from the Western Hemisphere had been numerically uncontrolled prior to 1965. Aliens from Western Hemisphere nations had been traditionally classified as non-quota and needed only to satisfy the qualitative requirements of the Act in order to obtain visas.¹⁰ However, the 1965 amendments abolished the non-quota status of Western Hemisphere aliens and classified them as "special immigrants". Section 101(a) (27)(A) of the Act, 8 U.S.C. § 1101(a) (27)(A).¹¹ A special annual quota of 120,000 was established for Western Hemisphere special immigrants (the "Western Hemisphere quota"), entirely separate and distinct from the annual 170,000 worldwide quota.¹²

Congress set forth one exception applicable to both the worldwide and the Western Hemisphere quotas. This applies in the cases of aliens who are the children, parents or spouses of United States citizens, regardless of where they are from. Such aliens are classified as "immediate relatives" and may be granted immigrant visas without re-

⁸ Section 201(a) of the Act of 1952, 8 U.S.C. § 1151(a), as amended by Section 1, Act of October 3, 1965, P.L. 89-236, 79 Stat. 911.

⁹ Section 202(a) of the Act of 1952, 8 U.S.C. § 1152(a), as amended by Section 2, Act of October 3, 1965, P.L. 89-236, 79 Stat. 911.

¹⁰ Section 4(c) of the Act of May 26, 1924, 43 Stat. 155; Section 101(a) (27) of the Act of 1952, 66 Stat. 163.

¹¹ As amended by Section 8, Act of October 3, 1965, P.L. 89-236, 79 Stat. 916.

¹² Section 21(e) of the Act of October 3, 1965, P.L. 89-236, 79 Stat. 921.

gard to the numerical limit.¹³ However, it is important to note that aliens with a similar relationship to *resident aliens* were not similarly exempt from the numerical quotas.

Subject to the annual 20,000 per country limit, Congress set up a system of preferences for the allocation of visas which is applicable only to aliens of the worldwide quota. Thus, aliens within this quota are accorded priority of admission ("preference") into the country on the basis of their relationships to United States citizens or lawful permanent residents, or on the basis of certain required skills. Section 203(a) of the Act, 8 U.S.C. § 1153(a),¹⁴ provides that the worldwide allotment of 170,000 visas is to be distributed in varying percentages on the basis of seven preferences.¹⁵ Again aliens from Western Hemisphere countries are accorded no preferences within their annual nu-

¹³ Section 201(b) of the Act of 1952, 8 U.S.C. § 1151(b), as amended by Section 1, Act of October 3, 1965, P.L. 89-236, 79 Stat. 911. In the case of an alien parent of a United States citizen, such citizen must be over twenty-one. Children must, in either case, be unmarried and under the age of twenty-one to qualify.

¹⁴ As amended by Section 3 of the Act of October 3, 1965, P.L. 89-236, 79 Stat. 912.

¹⁵ In summary, the preferences are: (1) 20 percent to unmarried sons or daughters of American citizens; (2) 29 percent, plus any unused portion of the first preference to the spouses and unmarried sons and daughters of permanent resident aliens; (3) 10 percent to aliens who are members of the professions or who have exceptional ability in the sciences or arts; (4) 10 percent, plus any unused portion of the first three preferences to married sons or daughters of American citizens; (5) 24 percent, plus any unused portion of the first four preferences to brothers and sisters of American citizens; (6) 10 percent to aliens capable of performing skilled or unskilled labor for which a shortage exists, and, (7) 6 percent to refugees. The priority of applicants within each preference is to be determined on a first come first served basis, and any visas that were unused by the preference groups would be allotted to non-preference aliens also on a first come first served basis.

merical ceiling of 120,000 and visas are issued entirely on a strictly first come first served basis.¹⁶

The significance of the absence of a preference system for the Western Hemisphere quota is made clear by reference to Section 212(a)(14) of the Act, 8 U.S.C. § 1182 (a)(14).¹⁷ Under this statute, aliens seeking to emigrate to the United States for the purpose of entering the labor market are excludable unless they obtain a labor certification from the Secretary of Labor. A statutory exception from this provision is provided for the "immediate relatives" of either worldwide or Western Hemisphere aliens and only those aliens from the Eastern Hemisphere who qualify for first, second, fourth or fifth preference under the worldwide quota.

As natives of the Western Hemisphere and spouses of permanent resident aliens, Noel and Petit are exempt from the labor certification requirements of the Act but remain subject to the numerical limitations of the annual Western Hemisphere quota. They are ineligible for any priority of admission through preferences, since the preferences system is inapplicable to Western Hemisphere immigrants. As a result, both had to go to the end of the line of applicants to await visa issuance.

c. The grant of extended voluntary departure is discretionary with the Attorney General

At the outset we note that the relief Noel and Petit are really seeking, permission to remain indefinitely in the country in their illegal status, is a privilege committed entirely to the discretion of the Attorney General and his authorized delegates. *Lee Pao Fen v. Esperdy*, 423 F.2d 6 (2d Cir. 1970); *Diric v. Immigration and Naturalization*

¹⁶ The Western Hemisphere quota became effective July 1, 1968.

¹⁷ As amended by Section 10 of the Act of October 3, 1965, P.L. 89-286, 79 Stat. 917.

Service, 400 F.2d 658 (9th Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969); *Bartsch v. Watkins*, 175 F.2d 245 (2d Cir. 1949).

The Act provides that the privilege of voluntary departure may be granted to a deportable alien in lieu of deportation by the Attorney General "in his discretion." Under 8 C.F.R. 244.2 the power to extend the period of voluntary departure, once it has been granted initially by an Immigration Judge, is vested exclusively in the District Director. Thus, a deportable alien has the right under the regulation to submit an application to the District Director, and has a right to a discretionary determination on the merits. However, the granting of the privilege is not a matter of right, but of administrative grace. *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957); *Polites v. Sahli*, 302 F.2d 449 (6th Cir. 1962). The Courts will not disturb a discretionary determination by the Attorney General unless the determination is found to be without any national exploration. *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966).

If there is any right being asserted in this case, it is the supposed right of Noel and Petit to remain in this country while they await the issuance of immigrant visas. Quite simply they have no such right under the Constitution which contains no requirement that illegal aliens be allowed to remain in the United States to await visa issuance, and they have no such right under the governing statute, which prescribed the terms and conditions of their entry. Indeed, the statute provides for their deportation, and in accordance with its provisions, they have been ordered deported.

Moreover, the courts have uniformly adhered to the view that a deportable alien has no enforceable right to remain in the United States while awaiting the issuance of an immigrant visa. *Spata v. Immigration Service*, 422 F.2d 30, 1013 (2d Cir. 1971), *cert. denied*, 404 U.S. 875; *Lee Pao Fen v. Esperdy*, 423 F.2d 6 (2d Cir. 1970); *Manantan v. Immigration and Naturalization Service*, 443 F.2d 30 (9th

Cir. 1971); *Wan Ching Shek v. Esperdy*, 304 F. Supp. 1086 (S.D.N.Y. 1969).

Thus, the issue here is whether the District Director abused his discretionary authority by denying the aliens' application for extended voluntary departure. The standard applied to their applications was whether or not any compelling factors were present to warrant the grant of relief. This standard is uniform throughout the Service in such cases and is certainly a reasonable one. Since the privilege is, in any event, a matter of grace, the aliens can hardly argue with the standards adopted by the Attorney General which govern the exercise of discretion by his subordinate.

Furthermore, the record before the District Director at the time he considered their requests contained ample justification for the denial of the discretionary relief of *extended* voluntary departure. The aliens are concededly deportable. They have abused the privilege of voluntary departure¹⁸ when that was granted to them in the past. These facts form a valid basis for the District Director's determination.

Although Noel and Petit had overstayed the period and purpose for which they had authority to remain in this country, and had apparently further violated their non-immigrant status by accepting employment, the Service, nevertheless, exercised its discretion in their favor by initially accordinng them the privilege of voluntary departure in lieu of deportation. They can hardly claim that they have any "right" to have this privilege extended.

¹⁸ The major advantage which an alien derives from the discretionary privilege of voluntary departure is that he avoids the possible later applicability of Section 276 of the Act, 8 U.S.C. § 1326 which requires any alien who has been previously deported from the United States to first obtain advance consent from the Attorney General before he can apply for readmission to the country.

d. The Court below was correct in holding that the Service policy is reasonable in view of the statutory distinction created between classes of aliens according to spouse classification

The 1965 amendments governing immigration from the Western Hemisphere, particularly the annual numerical limitations, and the labor certification requirements, gave rise to problems of administration and enforcement. Large backlogs developed on the consular waiting lists to the point where there is now a wait of over two years between the time an alien files his initial papers and the time he obtains his visa. Also, a practice developed whereby scores of Western Hemisphere aliens, unable to obtain labor certification, would come to this country, ostensibly as temporary visitors, and remain illegally in the hope of acquiring a relationship with a United States citizen or permanent resident alien. Once that relationship was acquired the major hurdle to immigration, the labor certification requirement, would be waived.

It was against this background that the Attorney General fashioned his policies regarding the grant of extended voluntary departure to Western Hemisphere aliens who were awaiting visas. For some period of time after the effective date of these amendments, July 1, 1968, it was the policy to liberally grant relief to relatives of both United States citizens and of permanent resident aliens.

This was justified in the case of alien relatives of citizens because they were not subject to the numerical limitations and could obtain visas after only a few months. At first, it was also justified in the case of close relatives of resident aliens because, although they were subject to the numerical limitations of the Act and had no preference priority, the backlog had not yet developed and they too could obtain visas after only a short wait.

By 1972, however, the picture had changed as concerned alien relatives of resident aliens since the backlog had developed and grown to large proportions. Accordingly, the Attorney General formulated the policy of which appellants now complain. Specifically, Western Hemisphere aliens with close relationships to lawful resident aliens were no longer to be routinely granted extended voluntary departure time to await visa issuance solely on the basis of this relationship. The considerations underlying this change in policy were twofold. One factor was that the long waiting lists had developed resulting in a long wait before a visa became available. A second factor was that the practice of aliens coming to this country and remaining illegally in the hope of acquiring the relationship had become widespread to the point where it adversely affected the domestic labor market. Thus, in the opinion of the Attorney General, the liberal policy of routinely granting relief was no longer consistent with proper enforcement of the immigration laws.

It had been a key objective of the 1965 amendments to strengthen "safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market. . . ." ¹⁹ So long as an alien who had failed to follow the duly established procedures for immigration to the United States could enter the country temporarily or illegally and demand a right to remain in the country and enter the labor market, the effectiveness of the legislature's attempts to protect the economy would be impaired and weakened. The nature of the Attorney General's discretionary authority is extremely flexible. Confronted with a changing economic situation such as a period of high unemployment, he can validly make the discretionary judgment, designed to protect the economy, that a particular

¹⁹ 1965 United States Code Cong. and Adminis. News, Vol. 2 p. 3329.

class of deportable aliens should not be permitted to further burden the labor market in order to carry out the Congressional intent to protect the economy. He may validly act on this discretionary determination even where the deported aliens may one day ultimately return to the United States. Nothing in the Act permits an alien to be excepted from any of the deportation provisions because he may eventually return lawfully to the country in a lawful status.

The Service policy of normally granting extended voluntary departure to illegal aliens who are married to United States *citizens* and eligible to apply for immigrant visas which would permit them to reside permanently in the United States, is primarily based on the fact that, since such aliens are no longer subject to the numerical limitations of the Act and the resulting delays, they can obtain immigrant visas in about five or six months.

Moreover, the Attorney General's grant of discretionary relief to this class of aliens is not repugnant to the statute; on the contrary, it merely reflects the special favoritism which is displayed towards the relatives of United States citizens in the Act itself.²⁰ As the administrator vested with authority to enforce the immigration laws, the Attorney General can fashion general policies for the guidance of his subordinates governing the grant of discretionary relief. *Fook Hong Mak v. Immigration and Naturalization Service*, 485 F.2d 128 (2d Cir. 1971). There this Circuit noted that the legislature's grant of discretion to accord a privilege means that the administrator can identify classes which are to be treated similarly, so long as the class is rationally differentiated from other cases, not within that class. "Nothing in this offends the basic concept that like cases should be treated similarly unlike ones differently." *Id.* at 730.

²⁰ See Point II, "e", *infra*.

In exercising its plenary authority over immigration, Congress did not choose to exempt the Western Hemisphere alien relatives of resident aliens from the annual numerical limitations. Indeed, this latter class is not only subject to the numerical limitations but they receive no preference within that limitation. Thus, Congress itself has made the distinction, a distinction which is entirely within its power to make. The Attorney General's policy regarding discretionary relief adopts the same distinction. Since the same distinction was made by Congress, the policy quite obviously is supported by a rational basis.

As we have indicated above, the policy was made necessary by the large backlogs which had developed and by widespread abuses of the immigration laws. These abuses had a detrimental effect on the domestic labor market. The purpose of the policy was to limit these abuses and achieve more effective enforcement of our immigration laws, which is certainly a lawful objective. *James v. Shaughnessy*, 202 F.2d 519 (2d Cir. 1953), cert. denied, 395 U.S. 969. Thus, the classification created by the statute and picked up by the Service policy was between aliens who were exempt from numerical limitations and aliens who were not. Since the same distinction was made by Congress, the Service policy was validly made in furtherance of the statutory objectives. We submit, therefore, that the District Court properly held the Service policy to be reasonable in view of the statutory scheme which places no immigrant visa quota on spouses of citizens, but imposes a numerical limitation on spouses of resident aliens.²¹

²¹ See Opinion at page 7 (70a).

e. Equal protection only bars invidious classifications

Appellants argue that the challenged policy "singles out lawful resident aliens living and working in the United States" and denies them a 'right' "which American citizens in exactly the same positions are routinely granted."²² "Such a policy," they argue "violates basic equal protection principles."²³

The truth is that neither citizen nor alien has any 'right' to prevent the lawful deportation of illegal aliens. Indeed, appellants' argument springs full-blown from the two-fold misconception, firstly, that equal protection requires identity of treatment, and second, that either a United States citizen or permanent resident alien has any protectable legal interest which can prevail when pitted against the paramount power of Congress to determine which aliens shall be admitted or expelled.²⁴ In fact, equal protection and statutory classifications are not mutually exclusive and not all classifications or statutory discriminations violate the requirements of equal protection. This Circuit has stated:

"It is only the 'invidious discrimination' or the classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. *Fleming v. Nestor*, 363 U.S. 603, 611, (1960); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)."
Gruenwald v. Gardner, 390 F.2d 591, 592 (2d Cir. 1968).

²² Page 20, Appellants' brief.

²³ Page 18, *Ibid.*

²⁴ The Government contends at Point I, *supra, infra* that the hardship which might be visited on relatives of deportable aliens does not make them 'real parties in interest' with a right, on that account, to prevent the deportation.

Thus, we see that equal protection does not require identity of treatment. It only requires that the statutory classification rest on real not feigned differences. The statute itself is replete with distinctions between various classes of aliens. For example, Congress recognized that the lack of a preference system for the Western Hemisphere would mean that certain Western Hemisphere alien relatives of United States citizens or permanent resident aliens would not get the same immigration benefits as aliens from other areas of the world having similar family relationships.²⁵ Nevertheless, the courts have consistently held that Congress has authority to distinguish between aliens of the Western Hemisphere and aliens from other areas. *Faustino v. Immigration and Naturalization Service*, 432 F.2d 431 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971); *Perdido v. Immigration and Naturalization Service*, 404 F.2d 656 (9th Cir. 1968), cert. denied, 394 U.S. 1013; *Talanoa v. Immigration and Naturalization Service*, 397 F.2d 196, 202 (9th Cir. 1968); *Application of Amoury*, 307 F. Supp. 213 (S.D.N.Y. 1969).

Furthermore, the statute frequently grants ameliorative relief only to aliens who are closely related to United States citizens. Simply by viewing their respective positions in reference to the ameliorative privileges contained in the statute, it is clear that Congress intended to afford far greater favor to aliens who are related to United States citizens than to aliens who are related to permanent resident aliens. Throughout the Act, the alien relatives of United States citizens are singled out for favorable treat-

²⁵ Worldwide quota aliens in appellant's Noel and Petit's position would qualify for second preference status and gain priority over most other quota immigrants. This distinction in treatment between worldwide and Western Hemisphere quota was challenged unsuccessfully in *Brodie v. Immigration and Naturalization Service*, (2d Cir. 1972), Docket No. 72-1429, Petition for review dismissed from the bench).

ment.²⁶ It is striking to note that the identical benefits are granted to alien relatives of permanent residents in only three instances.²⁷

²⁵ The following statutory benefits are granted to alien relatives of United States citizens:

Numerical limitations for worldwide immigrants does not affect immediate relatives of United States citizens. (8 U.S.C. 1151(a)); Discretionary relief from deportation may be granted where the alien relatives of United States citizens procured or sought to procure visas by fraud, but are otherwise admissible (8 U.S.C. 1251(b)); Alien relatives permitted to apply for the discretionary relief of suspension of deportation, (8 U.S.C. 1254(a)); First preference category for worldwide quota for unmarried son and daughters of United States citizens (8 U.S.C. 1153 (a) (1); Fourth preference catetgory is for immigrants who are the married sons and daughter of citizens of the United States (8 U.S.C. 1153(a)(4)); Fifth preference visas are limited to brothers and sisters of United States citizens (8 U.S.C. 1153(a)(5)); An alien who is the fiance of a United States citizen may be issued a non-immigrant visa for the purpose of entering the United States in order to marry the citizen (8 U.S.C. 1184(d)).

²⁷ Only three of the exceptions and benefits listed in footnote 28, *supra*, are granted outright to the immediate alien relatives of permanent resident aliens, namely the exemption from the labor certification requirements (8 U.S.C. 1182(a)(14)); the grant of discretionary relief to aliens, otherwise admissible, who have procured or sought to procure visas by fraud (8 U.S.C. 1251(b)); the grant of discretionary relief of suspension of deportation (8 U.S.C. 1254(a)).

In two other instances lesser or partial benefits are extended; however, they are *not* given to Western Hemisphere quota aliens, like Noel and Petit, but are given to Worldwide quota aliens only. Specifically these are as follows: (A) whereas the alien immediate relatives of citizens are completely excepted from all numerical limitations but aliens similarly related to permanent residents remain subject to these limitations and are given only a second preference behind adult, unmarried sons or daughters of United States citizens; (B) adult unmarried sons and daughters of United States citizens are given first preference status, those of permanent resident aliens second preference status only.

It is therefore clear, that far from intending identity of treatment as between the two groups, Congress plainly intended to confer greater favor on aliens with close familial relationships to Americans.

The Service classification, the appellants argue, violates the right of those not liberally treated to equal protection of law under the Constitution.

In *Boraas v. The Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds*, — U.S. —, 39 L. Ed. 2d²⁸ 797 (1974), this Circuit observed that the most recent test adopted by the Supreme Court in Equal Protection cases "permits consideration to be given to evidence of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it. Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact, substantially* related to the object of the statute (citations omitted). . . . If the classification, upon review of facts bearing on the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons such as overbreadth, it will be upheld." 476 F.2d at 814.

It is readily apparent that under this test, or under any other which we know, one indispensable element, in raising a Equal Protection issue, is the existence of some right which is adversely affected or impinged upon. As indicated earlier, however, the plaintiffs can point to no such right, fundamental or otherwise, which is adversely affected by the policy. Thus, in our view, there is no Equal Protection issue in this case.

Appellants reliance on a number of equal protection cases cited in their brief, is entirely misplaced. The cases cited in thier brief deal generally with State laws dis-

²⁸ The Supreme Court did not disapprove the Equal Protection standard this Court applied.

criminating against aliens and in favor of citizens.²⁹ In contrast, the classification here is between groups of aliens and not alien against citizen. More importantly, none of these cases striking down State statutes can be cited for the proposition that a classification made by the Federal Government, which has plenary power to regulate immigration, would be similarly treated. Indeed, Federal power over immigration preempts State power *Graham v. Richardson*, 403 U.S. 365 (1971).

Even should we assume *arguendo* that the plaintiffs could point to some right being impinged upon by the policy, they still could not show a violation of Equal Protection. The classification created by the policy, and its later modification, are nonetheless valid because they are supported by a rational basis and are in fact substantially related to a lawful objective. Cf. *Boraas v. The Village of Belle Terre*, *supra*; *Dandridge v. Williams*, 397 U.S. 471 (1970); *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973).

²⁹ Appellees cite *Sugarman v. Dougall*, 413 U.S. 634 (1973) [resident aliens barred by State law from competitive civil service positions] and *In re Griffiths*, 413 U.S. 717 (1973) [resident aliens denied permission to take state bar examination] as the relevant cases at issue on this point. However, these are both cases which involve State discrimination as between aliens and citizens and not an exercise of the Federal government's power to make classifications as between categories of aliens; likewise, *Yick Wo v. Hopkins*, 718 U.S. 356 (1886) [Municipal ordinance to regulate the carrying on of public laundries permitted arbitrary discrimination on the basis of race]; *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) [California statute barred issuance of commercial fishing license to persons "ineligible to citizenship"]; *Graham v. Richardson*, 403 U.S. 365 (1971) [State statutes denied welfare benefits to aliens under certain conditions].

POINT III

The Court below was correct in holding that the Service policy is not invalid for lack of publication.

Title 5, United States Code, Section 553(b), (the "Administrative Procedure Act") provides that:

- "(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."

The appellants contend that the 1972 policy and its later modification are invalid for lack of publication pursuant to this requirement. Section 553(b)(3)(A) provides that this requirement does not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice. . . ."

In making a determination as to whether agency directives are substantive rules requiring publication courts have frequently looked to the so-called "impact test".³⁰ See *Lewis-Mota v. Secretary of Labor*, 337 F. Supp. 1289 (S.D.N.Y. 1972), *rev'd on other grounds*, 469 F.2d 478 (2d Cir. 1972); *Texas, Inc. v. Federal Power Commission*, 412

³⁰ We note that "The more conventional test for determining the applicability of § 553 has been to consider whether the rule in question is a legislative rule, that is the 'product of an exercise of legislative power by the legislative body.' 1 Davis, Administrative Law Treatise § 5.03 (1958). Thus it has been held that § 553 covers only rules or regulations which have the force of law [citations omitted]. It is significant that the 'impact' cases . . . involve apparent legislative rulemaking, with [one] possible exception." *Lewis-Mota v. Secretary of Labor*, 337 F. Supp. 1289, 1294, *rev'd on other grounds*, 469 F.2d 478 (2d Cir. 1972). There is no legislative rulemaking involved here; the Attorney General is exercising his discretionary authority.

F.2d 740 (3rd Cir. 1969); *Pharmaceutical Manufacturers Association v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970). Briefly stated, the impact test requires that the impact involved be substantial and involve new rights and obligations. As set forth in *Lewis-Mota, supra*, the test requires that a reviewing court look to what the policy did. *Id.* at 482. If the policy has had a "substantial impact" then it must be published and such "substantial impact" would be present if the policy had the effect of changing existing rights and obligations.

With respect to appellants Noel and Petit, the District Court found that:

"Neither at the time the instructions were altered . . . nor at the time the Service determined to grant the benefit to those aliens who were already in the country and married to a permanent resident alien . . . were plaintiffs . . . married to permanent resident aliens" (76a-77a).

Accordingly, the District Court, in effect, found that the appellants had not shown that the policy had any "substantial impact" on their existing rights and obligations.

This conclusion is strongly supported by the record. The 1972 policy, and its subsequent modification, set forth guidelines under which applications should be considered on their individual merits, on the totality of the case, and directed that blanket stays should not be granted solely on the basis of a relationship to a resident alien. It is submitted that guidelines had no impact whatsoever on Noel and Petit because, since they never had a right to deferred departure, there was no change or alteration of any existing right or obligation.

Perhaps it is appellants' contention that the 1972 policy had an effect on them at the time it was changed because

such applications as they might later submit, if they married resident aliens, would no longer be considered under the earlier policy of leniency; a policy which gave overriding importance to the fact of relationship to a resident alien. Tenuous though this argument may be, it is appellants' only possible claim to an "existing right" at the time the policy became effective. Nonetheless, the fact that the Service may have had a policy of leniency in granting discretionary relief does not give aliens an existing protected right to have their applications considered under that policy once that policy, for valid reasons, has been changed. Cf. *Tan Wan Keung v. Immigration and Naturalization Service*, 434 F.2d 301 (2d Cir. 1971); *Diaz Vasquez v. Marks*, unreported, 73 Civ. 920 (S.D.N.Y. April 6, 1973) (MacMahon, J.).

We note that appellants rely heavily on *Lewis-Mota v. Secretary of Labor, supra*, which is clearly distinguishable from the instant case. Under the test set forth in *Lewis-Mota*, the challenged directive was found to have a substantial impact because it changed existing rights and obligations.

The facts in that case were as follows. As noted earlier, Section 212(a)(14) of the Act requires the exclusion of aliens seeking to enter the labor market unless the Secretary of Labor certifies that there are insufficient workers in the United States available to perform such labor. Acting pursuant to this authority the Secretary of Labor established schedules, each containing a list of occupations for which advance findings of fact had been made as to the certifiability of aliens having such occupations. As to occupations appearing on the Schedule C list, the Secretary of Labor had determined that the admission of aliens having such occupations would not adversely affect workers in the United States similarly employed.

Due to this advance finding made by the Secretary of Labor, aliens who could establish that they qualified under such an occupation were exempt from the general requirement that proof of a job offer in the United States be submitted in support of any application for labor certification. Schedule C, as originally established, was printed in the Federal Register (32 F.R. 867) on January 25, 1967.

Thereafter, the Secretary of Labor issued an unpublished directive purporting to suspend the precertification list, promulgated a regulation which established a new Schedule C and thereby abolished the old Schedule C. Complaining plaintiffs were a group of aliens who had been precertified, without the necessity of a job offer, under the old Schedule C. The effect of the suspension was that such aliens no longer had blanket certification and it became necessary for them to submit proof of a job offer to obtain revalidation of their previous certification.

Advance notice of this suspension was not published in the Federal Register. Accordingly, this Court held the directive invalid for failure to comply with the publication requirements of Section 553 of the Administrative Procedure Act, finding that the directive had a substantial impact because, by requiring the aliens to submit proof of a specific job offer, it changed existing rights and obligations. While not specifically stating it, the Court must have concluded that the aliens, once having been precertified under Section 212(a)(14) of the Act, had an existing right under the statute which had been changed by the directive.

A significant distinction between *Lewis-Mota* and this case is that, in *Lewis-Mota*, the Secretary of Labor was acting under a statutory obligation, imposed by Section 212(a)(14) of the Act, to issue labor certifications to aliens who qualified under the prerequisites he himself had established and originally published in the Federal Register.

There is no comparable statutory obligation imposed on the Attorney General to allow deportable aliens to remain in the United States while they await issuance of a visa. The change in policy affects solely guidelines for the exercise of discretionary authority by the Attorney General to confer an act of administrative grace on those aliens who, in his discretion, warrant such relief.

We further submit, that even if the Service policy change could *arguendo* be considered a "rule" within the meaning of the Administrative Procedure Act, it comes within the exception contained in 5 U.S.C. § 553(b)(A). This latter section provides that "general statements of policy" are not subject to the publication requirement of 5 U.S.C. § 553(b). A "general statement of policy" is one that does not impose any rights or obligations. See *Texaco, Inc. v. Federal Power Commission*, *supra*, at p. 744. The 1972 policy clearly did not impose any right or obligation on Noel or Petit. All that the policy did was to oblige them to put forth facts showing that their individual cases merited the grant of discretionary relief. This was not a new obligation because the burden of proving that a stay of deportation should be granted is always on the alien. *Roumeliotis v. Immigration and Naturalization Service*, 304 F.2d 453 (7th Cir. 1962), cert. denied, 371 U.S. 921;

Thus, it appears that appellants are attempting to use a technicality unrelated to their substantive rights as a means of circumventing defined and national policies well within the discretionary authority of the Service to promulgate without formal rule making.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees.*

LYDIA E. MORGAN,
MARY P. MAGUIRE,
*Special Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Pauline Troia,
being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 6th day of
two copies
September 19 74 she served ~~copy~~ of the within
govt's brief
by placing the same in a properly postpaid franked envelope
addressed:

Martin L. Rothstein, Esq.,
Fried, Fragomen & Del Rey, P.C.
515 Madison Ave.
New York, NY 10022

And deponent further says
she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse,
Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

6 day of September 1974

Walter G Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975